

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

TELEMARKETING RULEMAKING – COMMENT

FTC FILE NO. R411001

**SUPPLEMENTAL COMMENTS OF THE NOT-FOR-PROFIT AND
CHARITABLE COALITION IN RESPONSE TO THE
FEDERAL TRADE COMMISSION’S PROPOSED
AMENDMENTS TO THE TELEMARKETING SALES RULE**

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On behalf of the Not-For-Profit and Charitable Coalition (“Coalition”), the following comments are submitted by electronic mail in response to the Federal Trade Commission’s (“Commission”) request for supplemental comments on the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* (“TSR”). *See* Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002) (“Notice”). As requested by staff during the June 5-7 public forum, the Coalition’s supplemental comments address factual and other information related to the proposed TSR amendments, specifically, the do-not-call registry (“Registry”) as applied to nonprofit and charitable organizations based on the proposed amendments’ prohibition against professional fundraising firms’ communicating with certain donors to solicit charitable contributions and attendant implications on the ability of Coalition members to convey their nonprofit and charitable messages. We request that this supplemental comment will be placed on the public record pursuant to 16 C.F.R. 1.26(b)(5). *See* 67 FED. REG. 4492, 4534.

First, staff requests information on the impact on nonprofit and charitable organizations in states with do-not-call registries that *do not exempt* solicitations by or on behalf of charitable organizations. The Coalition believes that the available information substantiates the irreparable harm to nonprofit and charitable organizations as a result of the Registry. States have a substantial history of regulating donations to nonprofit and charitable organizations. As you know, virtually all states impose statutory and regulatory requirements

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on professional fundraisers soliciting donations on behalf of nonprofit and charitable organizations including registration, licensing, posting of bonds, point-of-solicitation disclosures, and annual reporting of financial information. Where states have created registries, the overwhelming majority exempt charitable solicitations by or on behalf of charities. *See* Comments of the Not-For-Profit and Charitable Coalition in Response to the Federal Trade Commission’s Proposed Amendments to the Telemarketing Sales Rule (“Coalition Comments”), at fn.17 and accompanying text.

There is little aggregated industry-wide financial data specific to nonprofit and charitable organizations that responds to staff’s request. However, the available data reveals a 40 percent reduction in donations in states with do-not-call registries that do not exempt charities and/or professional fundraisers.¹ For example, Indiana instituted a do-not-call registry in 2002 that does not exempt charitable solicitations on behalf of nonprofit and charitable organizations. As a result, the Military Order of the Purple Heart – a national organization affected by the Indiana registry – experienced a 37 percent reduction in previous donors in May 2002, and a 36 percent reduction in June 2002. The Indiana Association of Firefighters experienced a 38 percent reduction in previous donors in April 2002, and a 37

¹ The Coalition believes that a 40 percent reduction is a conservative estimate. Many state registries only recently have been implemented and have not received public exposure for a sufficient duration to accommodate all consumers that ultimately may elect to register. As a result, the current consumer sign-up rates in these states may not be an accurate long term barometer for the number of consumers that may sign up with the FTC’s Registry.

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percent reduction in May 2002. Members of the Coalition report similar reductions in Indiana. Of course, these reductions only account for current donors. The impact predictably is much greater when prospective donors are included.

The Coalition submits that it would be inappropriate for staff to adopt too narrow a view when assessing the negative impact on charities. Impact is not limited to financial implications defined by monetary or percentage reductions in donations. As explained in the Coalition's Comments, impact also must be understood in terms of reduced communications with current and prospective donors and diminution of the nonprofit and charitable message. Reduced communications can be quantified. Indeed, the record clearly suggests that the TSR amendments and the Registry will result in massive reductions in the number of telephone calls made on behalf of nonprofit and charitable organizations. By FTC estimates, there will be approximately a 40 percent reduction. Other record evidence cited by the FTC suggests substantially greater reductions are likely. *See* 67 FED. REG. 4492, 4517 & nn. 239-242. In contrast, the impact of the diminution of the charitable message inextricably intertwined with the communication and the request for support cannot be quantified but, nonetheless, inevitably will be substantial. *See* Coalition's Comments, Ex. B, ¶ 6 (Declaration of Henry C. Suhrke).

Second, the Coalition brings to the FTC's attention the June 17 Supreme Court decision in *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton, Ohio, Co.*,

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No. 00-1737, 2002 WL 1305851 (June 17, 2002). The FTC cites the lower court’s decision as supporting the regulation of professional fundraisers based on privacy grounds. Specifically, the FTC stated in the Federal Register:

While First Amendment protection for charities extend to their for-profit solicitors, *e.g.*, *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781 (1988), this narrowly tailored proposed rule furthers government interests that justify the regulation. One such interest is prevention of fraud. *E.g.*, *Sec. of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 969 n.16 (1984); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1231,1232 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). Another is protection of home privacy. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (targeted picketing around a home); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Ohio*, 240 F.3d 553 (6th Cir.), *cert. granted on other grounds*, ___ U.S. ___ (2001) (upholding law, based on both privacy and fraud grounds, forbidding canvassing of residents who filed a No Solicitation Form with mayor’s office).

67 FED. REG. 4492, 4497 n.51 (Jan. 30, 2002) (emphasis added).

Following the publication of the Federal Register notice, the Supreme Court decisively rejected the asserted privacy interest identified by the FTC in answering the question whether a municipal ordinance violates the First Amendment where it requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display the permit upon demand? In an 8-1 decision, the Court concluded that the local ordinance violated the First Amendment free speech rights. As the Court stated:

. . . *the Village’s administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of non-commercial “canvassers” promoting a wide variety of “causes.”* . . . The ordinance unquestionably applies, not only to religious causes, but to political activity as

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well. . . . The mere fact that the ordinance covers so much speech raises constitutional concerns. *It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.*

Watchtower, No. 00-1737, 2002 WL 1305851 (June 17, 2002)(emphasis added).

Finally, we respectfully submit for evidence that regulating professional fundraisers represents a substantial departure from the FTC’s previous statements with respect to the application of the TSR to professional fundraisers as opposed to fraudulent telemarketing. For example, the FTC issued an advisory opinion in 1995 to American Telephone Fundraisers Association, Inc. – a professional fundraiser – in which the FTC concluded that the TSR generally imposes no restrictions on the legitimate fundraising activities of nonprofits, including professional fundraisers, because seeking donations is not “telemarketing” under the statute and rule. *See The Applicability of the Telemarketing Sales Rule – The Telemarketing Rule generally Imposes No Restrictions on the Legitimate Fundraising Activities of Nonprofit Organizations*, 120 F.T.C. 1154 (Dec. 15, 1995). The advisory opinion states:

The Commission’s understanding is that telephone fundraising on behalf of nonprofit organizations is not, in fact, typically undertaken as part of a “plan, program or campaign . . . conducted to induce the purchase of goods or services.” . . . Legitimate fundraising activity is conducted primarily to elicit donations and not to induce purchases. Even when donors receive gifts, premiums, memberships or other incentives, representatives of the non-profit sector have advised the Commission that legitimate charities generally do not conduct telephone solicitations in which the stated or actual value of goods or services offered exceeds the amount of a donor’s payment. *The Commission’s enforcement experience suggests that fraudulent telemarketers, in contrast,*

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obtain money from consumers by promising goods or services with inflated values as consideration for smaller “donations.”

Id. (emphasis added). The advisory opinion also acknowledges that the “Commission’s construction of the term ‘telemarketing,’ as defined in the Act and the Rule, is *fully consistent with the legislative purpose of the Telemarketing Act*. The Commission’s interpretation permits efficient interdiction of fraud without encumbering the legitimate use of telemarketing by sellers of good or services or by non-profit entities. In sum, the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations.” *Id.* (emphasis added).